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1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

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3 PHOENIX ANCIENT ART, S.A., et
4 al.,

Plaintiffs,

5 v.

24 Civ. 1699 (GHW)

6 QATAR INVESTMENT AND PROJECT
7 HOLDING, CO, W.L.L., et al.,

8 Defendants.

Telephone Conference

9 -----x

New York, N.Y.

May 29, 2024

1:00 p.m.

10 Before:

11 HON. GREGORY H. WOODS,

12 District Judge

13 APPEARANCES

14 PEARLSTEIN & McCULLOUGH, LLP
15 Attorneys for Plaintiffs

16 BY: MICHAEL McCULLOUGH
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Attorneys for Defendant Simon Jones Superfreight
22 BY: CHRISTOPHER J. MERRICK

23 NICOLE A. SULLIVAN
MICHAEL WHITTICAR
Attorneys for Defendant Phoenix Freight
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(The Court and all parties present remotely)

THE COURT: First, let me ask everybody to please place their phones on mute. We're hearing a lot of background noise and repetition of what I'm saying. That's happening because not everybody has their phones on mute. So, again, thank you for placing your phones on mute. It's very helpful.

Good. So the first substantive thing that I want to do is to take appearances from the parties. I'm going to start with counsel for plaintiff. To the extent that any party has more than one lawyer on the line, I'll ask the principal spokesperson for that party to identify him or herself and the members of their team rather than having each lawyer introduce themselves individually.

Let me start with counsel for plaintiff, who's on the line for plaintiff?

MR. McCULLOUGH: Good afternoon, Judge Woods.

Michael McCullough, Pearlstein & McCullough LLP, 641 Lexington Avenue, 13th Floor, New York, New York 10022. I'm joined on the phone for plaintiff with William Pearlstein and Anju Uchima.

THE COURT: Thank you.

Who's on the line for Qatar Investment and Project Holding Co.?

MR. SMITH: Good morning, your Honor.

Dustin Smith for Hughes Hubbard & Reed appearing on

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1 behalf of Qatar Investment and Project Holding Co. I'm here
2 with my colleagues Greg Farrell and Scott Sanders.

3 THE COURT: Thank you.

4 Who's on the line for Simon Jones Superfreight?

5 MR. MERRICK: Good afternoon, your Honor.

6 Chris Merrick on behalf of Simon Jones Superfreight.

7 THE COURT: Thank you.

8 Who's on the line on behalf of Phoenix Freight? Is
9 anyone on behalf of Phoenix Freight on the line?

10 MR. WHITTICAR: Michael Whitticar and Nicole Sullivan.

11 THE COURT: So let me start with a few brief
12 instructions.

13 First off, thank you again for placing your phones on
14 mute and keeping them on mute at all times except when I'm
15 speaking or one of the parties is speaking; that is, you are
16 the party that's speaking. Again, please keep your phones on
17 mute at all other times to avoid unnecessary background noise.

18 Second, please state your name each time that you
19 speak. Please do that even if you have spoken previously.

20 Third, please keep your phones again on mute.

21 Fourth, please abide by instructions from our court
22 reporter that will help her do her job.

23 And finally, I'm ordering that there be no recording
24 or rebroadcast of all or any portion of today's conference.

25 So this is a pre-motion conference with respect to two

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1 proposed motions to dismiss by two latter defendants. I'm
2 going to do what we did in our prior pre-motion conference and
3 invite each of the potential movants to describe the grounds
4 for the motion to the extent that there's anything that you
5 want to add to or to clarify from the written pre-motion
6 conference letters. I'll then give counsel for defendant the
7 opportunity — plaintiff, rather, the opportunity to respond to
8 any of those comments about the anticipated arguments. Then I
9 expect to turn to setting a schedule for briefing of the
10 motion.

11 I'm going to begin with counsel for Superfreight. I
12 expect that you too will have read the plaintiffs' response
13 letter that was filed in response to your pre-motion conference
14 request letter. So to the extent in your remarks you'd like to
15 address any of those anticipated arguments, you're welcome to
16 do so.

17 So, counsel for Superfreight, let me hear from you.

18 MR. MERRICK: Thank you, your Honor. Again, this is
19 Chris Merrick on behalf of Simon Jones Superfreight.

20 And as set forth in our briefing, we have really two
21 main arguments in addition to the forum non conveniens
22 argument. The first one, and most obvious, is the Montreal
23 Convention argument. And just at a high level, the goal of the
24 Montreal Convention is uniformity. So similar to the Carmack
25 Amendment for loss or damage on land or COGSA that would exist

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1 the sea, the goal is that the law doesn't change every time you
2 pass over a new country or if, God forbid, you get diverted or
3 things like that may happen, but to have one uniform set of
4 rules and regulations and liability in the event of loss,
5 damage, or delay in transit.

6 From reading the plaintiffs' letter, it appears that
7 everybody agrees that when — at least when the Convention
8 applies, it would preempt common law claims like fraud claims.
9 The issue, at least as I read the plaintiffs' letter, seems to
10 be more about whether it applies here, and there seems to be
11 three main theories for why it would not apply. And if you
12 don't mind, I would address all three of those here.

13 The first one is that Simon Jones Superfreight — but,
14 to be clear, not Door To Door — was just a consignee for the
15 shipment. It was not a freight forwarder responsible for
16 facilitating the air carriage. But that's at odds with the
17 plaintiffs' entire theory of the case, as they specifically
18 plead in the complaint that Simon Jones is a freight forwarder.
19 They also refer to Simon Jones Superfreight as a freight
20 forwarder in their letter to the Court for the last hearing.
21 They can't transform their complaint and their theories of the
22 case in the motion papers.

23 Secondly, there's an argument that the culpable
24 conduct —

25 THE COURT: Hold on. Can you just point me to the

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1 paragraph in the complaint where they describe your client as
2 that?

3 MR. MERRICK: Sure. Give me one second, your Honor.
4 Let's see.

5 Apologies for going too quickly there.

6 The complaint is paragraph 2 and then paragraph 13, in
7 particular, is where Simon Jones Superfreight is alleged to be
8 a freight forwarder.

9 THE COURT: Thank you. Go on.

10 MR. MERRICK: So in addition — and just to be clear
11 for the record again, this is Chris Merrick. Attempting to
12 speak a little slower here as well.

13 The record referenced for the letter to the Court
14 where Simon Jones Superfreight was held out to be a freight
15 forwarder is — it's ECF 23.

16 So then the next argument is that the culpable conduct
17 at issue occurred prior to air carriage. So even though the
18 goods were seized in the course of air carriage, it would be
19 outside of the cope of the Montreal Convention. But, again,
20 the text of the Convention itself makes clear that the
21 operative question is where the loss, damage, or delay
22 occurred, it's not the location of the conduct that
23 precipitated the loss, damage, or delay. That would defeat the
24 whole purpose of uniformity. For example, if there was damage
25 that occurred because the lug nuts weren't put properly on the

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1 plane and you had to identify, well, did it happen that morning
2 at the airport or did it happen at a repair facility somewhere
3 else, the question is where the loss or damage occurred, and
4 that is — in our opinion, that's what the act itself says.

5 And here again, there's an allegation that the goods
6 were transported by air on Virgin Atlantic — this is
7 paragraph 2 of the amended complaint — that they were seized
8 at Heathrow Airport and then returned to the Customs and Border
9 Patrol in the United States after carriage. So it would defeat
10 the whole purpose of uniformity for losses arises at air
11 carriage if the law changed depending on whether the paperwork
12 here was filled out prior to the carriage or on the plane. The
13 issue is where did the loss, damage, or delay occurred.

14 There's also an argument that the Montreal Convention
15 does not apply because the goods were never delivered. That's
16 again completely at odds with what the Convention actually
17 says. I mean, if that were the case, you could never have a
18 claim for a loss of goods during air carriage because if goods
19 are lost inherently they weren't delivered. So the case that
20 they cite to pertain to situations where there was no air
21 carriage at all or a refusal to provide air carriage. Again,
22 that's not what happened here. As alleged in the complaint,
23 Virgin Atlantic transported these things across the Atlantic.

24 Lastly, why does the Montreal Convention matter? In
25 addition to preempting the claim, there is a two-year statute

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1 of limitations in addition to a limitation of liability based
2 on the weight of the goods. The argument against the
3 application of the limitation of liability and the statute of
4 limitations is that we are basing it on some kind of novel
5 interpretation of a new case that was just issued, but that's
6 just not the case. Article 35 of the Convention provides that
7 there's a two-year statute of limitations beginning with
8 arrival at destination, the date on which the aircraft ought to
9 have arrived, or the date on which carriage stopped. And here,
10 all three of those are clearly 2018.

11 The fact that customs returned certain goods in 2023
12 and the full effect of the loss maybe was known at that point
13 isn't what at — isn't how the statute of limitations is
14 measured under Article 35 of the Convention. And this would
15 encompass indemnity claims as well as any claims under the Act.
16 As the Act made clear, it encompasses all claims that would
17 exist in connection with the Act.

18 So moving forward to the fraud component, even if
19 there weren't preemption, the fraud claim would fare no better.
20 The theory of plaintiffs' fraud case seems to have shifted
21 since the last conference where the Court will recall that the
22 plaintiffs alleged that the defrauded party was the American
23 people, and they allege the right to recover under a
24 third-party reliance doctrine that the New York Court of
25 Appeals previously rejected in the context of fraud claims.

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1 The new theory is that the plaintiffs allege that they
2 were defrauded because Simon Jones and Door To Door didn't
3 inform plaintiffs of their intent to fill out false paperwork.
4 I mean, this doesn't even pass the red face test. There's a
5 duty to plead fraud with specificity, not just wild speculation
6 and conjecture. There's no explanation at all in the complaint
7 as to why Simon Jones or Door To Door would have such an intent
8 or how it would possibly benefit Simon Jones or Door To Door.
9 In the case of Simon Jones, it's bad for business to have goods
10 seized. That's bad for a lot of different reasons, including
11 this case, they didn't get paid. There's no benefit to them
12 whatsoever in having goods seized.

13 Second, there's no identification of what laws, rules,
14 or regulations Simon Jones violated, if any. Here, the goods
15 were returned. It's not even clear — there's no allegation of
16 what Simon Jones — that they even had any obligation when
17 filling out an invoice to provide any information that they
18 didn't provide. And even if we were to go past that and assume
19 that something — some law, rule, or regulation was violated
20 that hasn't been cited, they haven't established that it was
21 done with ill intent, rather than just a mistake, in failing to
22 include this origin.

23 Additionally, for an omission, as what the plaintiffs
24 are now arguing, for it to be actionable, there would have to
25 be a duty to speak. And the most common situation is where

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1 there's the fiduciary relationship between the plaintiff and
2 the defendant. Here, there's no allegation of that at all, so
3 there's no actionable omission on the fraud front either.

4 We could go through the other elements as well if the
5 Court would like, but we think that it's pretty clear that
6 there's no fraud case alleged or even anything that's close,
7 and therefore, we would ask that the Court allow us to file a
8 motion to dismiss on the grounds stated.

9 THE COURT: Thank you, counsel.

10 Let me hear from counsel for Phoenix Freight. What's
11 the grounds for your anticipated motion, if there's anything
12 that you'd like to flag beyond what's included in your letter
13 or to highlight from the letter from counsel for Superfreight's
14 comments. You are —

15 MR. WHITTICAR: Yes, your Honor. This is Michael
16 Whitticar for DTD, and I reiterate what counsel for Simon Jones
17 said regarding the Montreal Convention and the fraud claim. I
18 have a few additional points to add.

19 First, plaintiff in its letter response cites a *Danner*
20 case claiming that carriage lasts until the recipient received
21 the goods. That's an unreported case out of the District of
22 Maryland from 2010. More recently, there was a case of *We CBD*
23 *LLC v. Planet Nine*, a 2023 case out of the Western District of
24 North Carolina which specifically distinguished *Danner* and said
25 that the rule of that case did not apply where Customs and

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1 Border Patrol customs seizes the goods or stops the goods.
2 That in that case the carriage has stopped.

3 So in the CBP — when the Customs and Border Patrol
4 customs authorities seized the goods, then the carriage has
5 stopped. Under Article 35 of the Montreal Convention with its
6 limitation of actions, it says that the two-year period of
7 statute of limitations or condition to sue, it runs from the
8 date on which the carriage stopped. I think the authoritative
9 rule is very clear that when your goods get seized by customs
10 authorities for several years, the carriage has stopped and the
11 statute of limitations begins to toll.

12 We agree with Simon Jones that the limitation of
13 liability language of the Montreal Convention runs from the
14 time — from the time and place of injury rather than the time
15 or place of the wrongful conduct. Under Article 22,
16 paragraph 3, it talks about the liability of a carrier in the
17 case of destruction, loss, damage, or delay. The limitation of
18 a liability expressly applied to destruction, loss, damage, or
19 delay. So that's basically the liability limitation and the
20 statute of limitations in application of the Convention applies
21 to the type of injury and the place and time of injury and not
22 to the alleged misrepresentation.

23 Finally, we agree that an insufficient fraud claim has
24 been pled here, especially against my client, because we have
25 the issue of pleading. There's really no misrepresentation or

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1 lie or falsehood to the plaintiff pled against my client. The
2 facts pled against my client, DTD, are that all we did was
3 recycle incorrect paperwork provided by Simon Jones. So that
4 would be, at worse, some sort of negligence, failure to warn,
5 failure to perform, which is clearly not actual fraud, and it
6 shouldn't be preempted by the Montreal Convention.

7 And under the *Pasternak* case, we have the issue of a
8 party cannot sue for a fraudulent representation made to a
9 third party unless that third party is like a broker or an
10 agent and expected to relay it to the plaintiff, which is not
11 the case here.

12 And again, there's just a lot of group pleading where
13 they just lump the defendants together and they fail to
14 distinguish my client from the other defendants. They really
15 plead nothing specifically against my client other than they
16 recycled some allegedly defective paperwork provided by Simon
17 Jones, and I would say that's insufficient to state an actual
18 fraud claim against my client.

19 In the *Pasternak* case, they made it clear that
20 generally a plaintiff cannot claim reliance on a
21 misrepresentation that defendant made to third parties unless
22 the representation is made — representation is intended to be
23 communicated to the plaintiff and for plaintiff to rely on it.
24 It's clear here that my client made no representations to the
25 plaintiffs, nor is alleged to have made any representations to

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1 the plaintiff.

2 So then they fall back on fraud by omission, but there
3 was no fiduciary duty or even direct contractual relationship
4 between my client and the plaintiff, so there was no duty to
5 disclose, no fiduciary duty.

6 And in their latest round of letter opposition, they
7 seem to claim that Simon Jones made a false promise to them,
8 but, again, that was a promise made by Simon Jones, not my
9 client, DTD. And there are insufficient facts alleged to show
10 that the false promise was intended to be false or that anybody
11 intended for it not to be performed when it was made.

12 So I would rely on the Montreal Convention, and also
13 there's insufficient pleading of fraud and the substantive
14 inapplicability of their fraud claim to my client, which was
15 not interacting with the plaintiff.

16 THE COURT: Thank you.

17 So I'll turn back to counsel for plaintiff to have the
18 opportunity to preview any arguments that you expect to present
19 in opposition to the motion. Let me hear from you, counsel for
20 plaintiff. What would you like to share?

21 MR. McCULLOUGH: This is Michael McCullough.

22 One clarification, your Honor. Counsel for Door To
23 Door cited a North Carolina case. I did not get the name of
24 that case or the citation. I'm wondering if we could clarify
25 that case before we go forward.

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MR. WHITTICAR: Certainly.

THE COURT: Counsel, would you mind saying the citation again, please.

MR. WHITTICAR: Sure. It is *We CBD*, as in like the CBD lotion that you put on your aching joints, *LLC v. Planet Nine Private Air, LLC*, 2023 U.S. Dist. LEXIS 102029 (W.D.N.C. 2023).

MR. MERRICK: This is Chris Merrick for Simon Jones.

We also cited that case in our briefing, document 28, second page.

THE COURT: Thank you, counsel.

Very good. Counsel for plaintiff, anything that you'd like to share?

MR. McCULLOUGH: Yes. This is Michael McCullough.

First, our argument with regard to the Convention is that the Convention applies — Article 19 of the Convention applies to carrier liability for delay in the transport of baggage, passengers, and cargo. So my understanding from the defendants' letters are that this is a case of delay, and Article 19 applies because it's cargo.

Our argument is that, in this action, Superfreight is not acting as a contracting carrier under the terms of the Convention. So while we use the term "freight forwarder" because Simon Jones holds themselves out to be a freight forwarder, they weren't acting as a carrier under the

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1 Convention. So that's our argument. So the argument that we
2 said they were a freight forwarder to us doesn't make a
3 difference.

4 Superfreight is named on the Door To Door waybill, not
5 as a carrier but as a consignee of the shipment and therefore
6 is not a contracting carrier.

7 Our second argument with regard to Superfreight is,
8 even if it were a carrier, they don't get any protection under
9 the Convention because, first, it applies — the Convention
10 applies to damage due to delay. And in our fraud claim, which
11 arises out of neither air carriage nor delay, the fraud
12 occurred before the shipped items were shipped, before they
13 were collected by Door To Door on September 11.

14 So let's clarify what we talked about in the last
15 phone conference we had. The Court asked me about the damages,
16 and what I said is in the first instance the government acts,
17 and in the second instance the pecuniary loss happens. That's
18 not our fraud claim. It never was our fraud claim, and as I
19 clarified on that call, the fraud has to do with the omission
20 by all the defendants, all three defendants, of the fact that
21 the invoice provided by Phoenix Ancient Art to Superfreight was
22 not used by the parties, by the defendants. They created a
23 different invoice. That invoice isn't represented on the
24 waybill. So on the waybill it still says Phoenix Ancient Art
25 invoice and has the correct information.

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1 What the defendants did is simply failed to inform us
2 that when they took over the shipping, they weren't going to
3 use the documents we provided, and that's in the complaint. So
4 there's no — I don't see any argument that it's not — had we
5 known they were going to do this, we would not have allowed
6 them to control the export. So I think if that's not clear, it
7 could be made clearer. It's clear enough to me.

8 So again — but this all happens before the items are
9 shipped. So the false export declaration happens, we're
10 damaged, but the fraud happens before the items are shipped.
11 So I think —

12 THE COURT: Let me just pause you on that. I
13 apologize.

14 The counsel for Superfreight argues that the complaint
15 does not plead a duty to speak such that that omission would be
16 actionable as fraud. How do you respond?

17 MR. McCULLOUGH: Well, we have to look at all three
18 defendants because there's cascading agencies going on. So
19 let's just clarify what each party is representing.

20 So within the exchange agreement, the principal in the
21 exchange agreement is QIPCO. Superfreight and Door To Door are
22 not part of the exchange agreement. However, QIPCO, the
23 principal, appoints Simon Jones to act on its behalf in
24 collecting the property and for appointing its agent, Door To
25 Door, to act as a shipping company. It acts as the carrier.

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1 So when — QIPCO clearly has a duty under the contract
2 to provide us with information about how this export is being
3 done. I mean, they said they would take care of this. They
4 omitted this information. They had a duty to tell us if they
5 were going to omit this information. Superfreight is —

6 THE COURT: I'm sorry. I'm sorry. Let me stop you.

7 That's the question. Why do they have the duty? If
8 it's a contractual arrangement, why do they have a fiduciary or
9 other duty to your client?

10 MR. McCULLOUGH: Well, QIPCO's not a fiduciary. QIPCO
11 is just a contracting party, but within that contract they
12 assume the responsibility to export. So our position is as
13 soon as they assume that responsibility and told — and we gave
14 them the information to use, they had an obligation to tell us,
15 no, we're not using that information. That was part of the
16 agreement.

17 THE COURT: Thank you.

18 What section of the agreement describes that duty?

19 MR. McCULLOUGH: Well, again, it's not a written
20 agreement, so the agreement — well, there's not a written
21 contract. The agreement was a series of email conversations
22 that culminated in a meeting in which the parties agreed to the
23 exchange. Once the exchange was agreed on, there were emails
24 between QIPCO and then Simon Jones as agent acting on behalf of
25 QIPCO about the commercial invoice, about the pickup, about the

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1 packing, about the execution of the agreement. So in those
2 emails there is an agreement that QIPCO and Simon Jones and
3 then their agent Door To Door would handle the shipping. And
4 on a number of occasions, as pled in our complaint, Alex
5 Gherardi, on behalf of Phoenix Freight, said: Here's the
6 information. It's important you use this and do this properly.
7 That's —

8 THE COURT: I'm sorry. Let me just call the question.
9 You're describing the Superfreight and DTD as the
10 agents of QIPCO, and I assume that you're going to hold to that
11 position. If they are QIPCO's agents, why did they owe your
12 client any duty?

13 MR. McCULLOUGH: Well, Door To Door — well, let's —
14 let me preface the next statement on the fact that we've
15 already told the Court we're intending to amend our complaint.
16 And what's not in our complaint is that Door To Door, on behalf
17 of Phoenix, requested that Phoenix Ancient Art appoint Door To
18 Door as their agent for the export. So there was a power of
19 attorney issued. So that's not in our complaint. It will be
20 in our amended complaint.

21 THE COURT: Thank you. Go on.

22 MR. McCULLOUGH: OK. So we left off at the point
23 where we believe that there — even if there was — on behalf
24 of Superfreight, even if there was a — even if the Convention
25 applies, there wasn't a delay in carriage because Article 19

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1 cited in Superfreight's letter applies to damages occasioned by
2 delay. Now, again, the fraud happens before. Let's put that
3 aside for a second and get back to that.

4 The plain language of Article 19 governs delay, and as
5 we cite a couple of cases, *Vumbaca* and *Samaley*, the delay means
6 the air carrier properly delivered persons, baggage, or cargo
7 to the appropriate destination but did so in an untimely
8 manner. Now, in this case our fraud claim alleges
9 nonperformance because Door To Door — Door To Door's waybill,
10 which is referenced in the complaint, clearly shows that the
11 carriage was from Electrum's gallery in New York to
12 Superfreight's offices in Central London, and the objects were
13 stopped by His Majesty's Revenue and Customs, detained, and
14 never delivered to the ultimate destination. So since the
15 contract of carriage is not performed, this is not a case of
16 delay; this is a case of nonperformance.

17 Furthermore, under Article 19 the carrier must prove
18 that it took all precautions reasonably calculated to prevent
19 the loss or delay — to prevent the loss. It doesn't say
20 delay, prevent subject loss. So to the extent there is a loss,
21 passing a false invoice to two customs services is hardly a
22 reasonable act of precaution.

23 The last point as to Superfreight is that with regard
24 to the time-bar issue, the case cited is *Zurich*. The *Zurich*
25 case, *Zurich v. China Eastern Airlines*, which was decided by

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1 the Eastern District in January, this case in applicable
2 because Superfreight nowhere contends that damage rather than
3 delay is at issue, and that was a case of damage.

4 So we believe the claim is timely because — back up.

5 The *Zurich* case was a case of first impression. The
6 court in the Eastern District says no one has ever decided this
7 issue before, and our contention is when the waybill provides
8 for a door-to-door delivery, the period for carriage is
9 generally when the goods are received. In the normal customs
10 case, there's a delay, there's a paperwork issue, there's even
11 possibly a payment and seizure, but eventually the goods are
12 released and then the carrier continues to carry.

13 So all the cases we've seen are cases in which there's
14 a delay in the carriage and then there is at some point a
15 further movement in delivery. Here, Superfreight, the
16 consignee, never received the goods in Central London, and the
17 consignor, Phoenix Ancient Art, received the goods back on
18 October — in October 2023.

19 Now, if a court — if this is a question of first
20 impression with regard to this fact pattern, I would think that
21 a court would reason that if the goods are held by a customs
22 service for five years, the plaintiff doesn't know their cause
23 of action and their damages unless and until the goods are
24 returned. So if there's not a delivery, if there's never a
25 delivery, I would think the rule would be whenever the

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1 consignee — sorry, the consignor receives its goods back would
2 start the statute of limitations. So that's our argument on
3 statute of limitations.

4 THE COURT: Is there case law that you're pointing to
5 for that proposition?

6 MR. McCULLOUGH: No, because, as you mentioned, the
7 *Zurich* case is a case of first impression. It was just decided
8 in January, and since that case doesn't apply, we have no
9 cases.

10 THE COURT: Thank you.

11 But, presumably, you're looking at other cases to
12 support the reasoning, which, as I understand it, is that no
13 statute of limitations should logically begin until the amount
14 of damages are known irrespective of when you knew that there
15 was an injury.

16 MR. McCULLOUGH: We don't have a case on that, no. I
17 don't have a case on that, no. I won't represent that there's
18 no case. So there could be a case. We don't have a case cited
19 on that.

20 THE COURT: Thank you.

21 Why, then, do you argue that the natural reading of
22 the statute would be that the cause of action does not accrue
23 until the amount of damages is known? What's the parallel case
24 law that supports that argument?

25 MR. McCULLOUGH: Well, we didn't cite any case law

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1 that supports the argument. I'm not sure that's the argument,
2 though. I think the argument is one — until the goods are
3 returned, there's certainly — I'll agree with you that there
4 is — the goods are being held. So they haven't been received.
5 They haven't been delivered to the consignee, and the consignor
6 doesn't have them. So they're in limbo.

7 But in this case the consignor, who released the
8 goods, doesn't fully know even what cause of action they have
9 until — especially if it's a government agency acting because,
10 again, in this case that's exactly what happened. We didn't
11 fully know if — again, this is complicated because in this
12 case the statute of limitations ran. So there never was a
13 final administrative act by the customs service determining the
14 reason for the liability.

15 So in this case we never knew the reason — these
16 goods were detained. They were never forfeited. So we never
17 had a statutory basis for the loss of goods. In fact, they
18 weren't lost because the statute of limitations ran. So in
19 this particular case, we never fully knew what our cause of
20 action was and our damages were until the statute of
21 limitations ran and customs just said you can have your goods
22 back.

23 So analogizing to this case, I would say, because
24 there is no rule on statute of limitations and because we
25 couldn't have known fully our causes of action and our damages,

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1 it would make — it would just make logical sense to me,
2 without a reference to a case, simply that the statute would
3 start running when we received our goods back.

4 I hope that answers the question, your Honor.

5 THE COURT: Thank you.

6 You may benefit from supporting your arguments with
7 more than counsel's belief but with instead case law, but
8 that's what the briefing is for.

9 Go on.

10 MR. McCULLOUGH: Sure.

11 So with regard to the fraud claim, then, let's get to
12 the penultimate point. The plaintiff has set forth a fraud
13 claim. And again, as I mentioned earlier, the discussion we
14 had last time with the context of the Court's question about
15 damages, how the damages occurred, I agree that in the first
16 instance it's the government act, but the government's acting
17 on a statutory basis, right? There's a breach of a statute.
18 There's a breach of a statute that allows the goods to be
19 returned to the U.S. However, that's not the fraud. So the
20 fraud is — the elements of the fraud are the omission. The
21 omission is the fact that these defendants did not tell us they
22 were going to use the invoice and information we provided.
23 They used another one, and we were damaged because of it.

24 So we were induced, in a sense, to allow them to use
25 — to control the shipment, to make the declarations on our

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1 behalf, and they did so in a fraudulent manner. And we relied
2 on this omission because, as the complaint states, we would
3 have never allowed them to handle the export had we known they
4 were going to do it this way. We had no reason to believe they
5 would do it this way. And as we pointed out in our complaint,
6 both Superfreight and Door To Door hold themselves out as with
7 expertise in this area, so there's no reason for us to believe
8 this would have done this way.

9 And we did make a request in our letter of a document
10 that we know exists in the case in London, and this document
11 came up in discovery. It was disclosed in the UK litigation,
12 but the UK court rules don't allow us to use it in this action.
13 So our UK solicitors will apply for permission to disclose that
14 document in that action, but that timing is uncertain.

15 So we would ask this Court to allow us limited
16 discovery on a single document with regard to our fraud claim
17 which we will — which we believe will clarify some of the
18 points we're discussing today and would be the basis of a
19 second amended complaint that we think should be the basis of
20 any motions to dismiss going forward.

21 And lastly, on the forum non conveniens argument,
22 again, we — the forum non conveniens argument put forth by
23 QIPCO is one that is subject to the UK litigation. With regard
24 to Superfreight, I don't think any of the arguments apply.
25 Superfreight came to the United States, supervised the packing

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1 of the goods, of the objects; appointed an agent to act as
2 carrier, Door To Door; and then again used this false invoice
3 which was presented to U.S. Customs. I mean, all of that
4 happened in the United States. We don't think the United
5 States is an inconvenient forum for Superfreight given the fact
6 that they were physically here and these activities happened in
7 the U.S. So that's as to Superfreight.

8 As to Door To Door, we made the same arguments about
9 the Montreal Convention not applying, and we made the same
10 argument that this is — that we're not seeking damages due to
11 delay in carriage.

12 And lastly, we make the Article 19 argument that the
13 carrier is supposed to take precautions, and there were no
14 precautions taken here. We make the same argument on the
15 statute of limitations question, citing the *Zurich* case — or
16 distinguishing the *Zurich* case.

17 And the additional arguments for Door To Door is that
18 if the Convention applies, Article 10 of the Convention has
19 certain responsibilities of the carrier that wouldn't apply
20 because Simon Jones wasn't the carrier, and it says the carrier
21 shall indemnify the consignor against all damages suffered by
22 it by reason of the irregularity, incorrectness, or
23 incompetence of the particulars and statements inserted by the
24 carrier on its behalf in the cargo receipt or on the record
25 preserved in other means. So, obviously, the information on

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1 the false invoice was a violation of Article 10.

2 And for the same reasons we just discussed, we think
3 we have a viable fraud claim.

4 THE COURT: Thank you.

5 MR. McCULLOUGH: Thank you, your Honor.

6 THE COURT: Briefly, what do you say about the
7 contention that the complaint is deficient as a result of group
8 pleading?

9 MR. McCULLOUGH: I think, again, because of the
10 cascading agencies going on here, I think the complaint is
11 sufficient. I think it's sufficient information about which
12 parties are responsible parties, which parties handled the
13 false invoice. I mean, we claim that both Superfreight and
14 Door To Door were involved in the handling of the invoice.
15 Superfreight created the invoice, and that's something we pled.
16 Door To Door handled the invoice. I think there's enough in
17 there to show that these parties acted, and the omission of
18 those actions that we discussed earlier was something that
19 harmed the plaintiff. I think it's sufficient.

20 THE COURT: Thank you.

21 Just briefly on the nature of the underlying exchange
22 agreement, is it your position that a condition of the exchange
23 agreement was that the QIPCO entity used Superfreight and DTD
24 as its service providers?

25 MR. McCULLOUGH: Well, our understanding at the time

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1 that the contract was entered into is that — that QIPCO would
2 be using Simon Jones. So Simon Jones is known to be QIPCO's
3 freight agent. It sort of does freight forwarding work for
4 QIPCO. So they were known to us because there have been other
5 transactions, obviously, between the parties, and so Simon
6 Jones was a known agent.

7 With regard to Door To Door, I'm not sure Door To Door
8 was. It could have been. We didn't plead Door To Door was a
9 known agent at the time, but certainly Simon Jones was. So to
10 the extent that there was an agreement, I think it was simply
11 — it was a representation by QIPCO that these agents — this
12 agent, Superfreight at least, would be working on this
13 shipment.

14 THE COURT: Thank you. A representation. Thank you.
15 Understood. Very good.

16 So let's work together to set a schedule for these
17 proposed motions. Let me start with Superfreight. My
18 inclination here would be to set a briefing schedule that would
19 have both of these motions be fully briefed around the same
20 time. So let me start with Superfreight.

21 When would you propose to file your motion?

22 MR. MERRICK: This is Chris Merrick on behalf of
23 Superfreight.

24 Just the one issue that we would have with respect to
25 scheduling is I think, if I heard plaintiffs' counsel right,

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1 they are making the argument that they believe there should be
2 an amendment that is considered in the context of any motion to
3 dismiss, and we, I think, haven't heard anything to suggest
4 that that amendment would make any difference here to the
5 arguments. But at the same time, it is a lot of time and money
6 for my client for us to prepare two different sets of motions
7 to dismiss briefing. So our preference would be, if the Court
8 is inclined to grant leave to amend, that the amendment happen
9 first and then we have one round of briefing rather than two.
10 However, if the Court is not inclined to grant that, then I
11 think we could have our briefing together by the 21st of June,
12 which would be approximately three weeks from Friday.

13 THE COURT: Thank you.

14 I have not heard a request for me to authorize
15 amendment to the complaint now, and as a result, my
16 understanding of counsel for plaintiffs' comments is that he's
17 thinking about amending in response to a filed motion to
18 dismiss as his one amendment as of right, which they have when
19 they respond to a motion to dismiss. No one's made a request
20 to me to approve an amended complaint.

21 Just to frame this, if I were to grant a request under
22 15(a)(2), it would not preclude another change to the complaint
23 in response to a motion to dismiss, which parties have of right
24 under Rule 15(a)(1). So 15(a)(2) can sometimes avoid the need
25 for double briefing, but it doesn't guarantee it because I

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1 can't, in my view, prevent the plaintiff from taking advantage
2 of 15(a)(1) following an amendment with consent of the Court or
3 the parties.

4 So that's my understanding as a result of what counsel
5 was talking about when they said that they're planning to
6 amend, that they were planning to do so in response to a motion
7 to dismiss once filed, and you all know what the rules say
8 about that.

9 So, counsel for DTD, what's your view about the
10 proposed approach to filing the motion to dismiss?

11 MR. WHITTICAR: I agree that if plaintiff counsel does
12 want to amend, we should ask them whether they plan to do that
13 and when they could do that, but if that's not in the cards,
14 they don't want to do that before we brief this motion, I would
15 just ask that — I would ask that we have until June 28, just
16 because I'm going to be on vacation out of the country from
17 about the 8th through the 16th.

18 THE COURT: Thank you very much.

19 Good. So, counsel, the motion by QIPCO is due, I
20 think, on July 1. We pushed back that deadline as a result of
21 the potential proceedings in London as they might impact this
22 and to give space for that court to consider the issues. The
23 request made by counsel for DTD is that we set the briefing
24 schedule starting on the 28th. That's very close to July 1.

25 So my inclination is just to set everything on the

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1 same schedule and to have the motions be due on the 1st of July
2 with the same opposition deadline or reply date. Given that
3 this would have several motions being filed in parallel, I
4 could have the plaintiffs' response due sooner than the 21 days
5 that I originally established for the first set of briefs, but
6 my inclination at this point would be to keep it the same.

7 So my inclination here would be to set a briefing
8 schedule in which all the briefs would be due on the 1st of
9 July, the oppositions would be due within 21 days following the
10 date of service of the motion, and then any reply would be due
11 a week following the date of service on the opposition. If
12 there is an amended complaint, that would have to be filed,
13 under the rules, within that same 21-day period.

14 So that's my inclination. I will say — well, I
15 remind you of the rules that I can't preclude a party from
16 amending the complaint, again, following a motion to dismiss.
17 If I grant leave to amend the complaint under Rule 15(a)(2), it
18 still is oftentimes very efficient to proceed as counsel for
19 Superfreight suggested. And so while there's no application to
20 the Court at this time for me to approve an amended complaint
21 — there is no amended complaint that's been presented to me,
22 and I won't act on a motion without a black line and the
23 amended complaint to look at — I do strongly encourage the
24 parties to talk about this issue after today's conference. If
25 plaintiff knows how they want to amend the complaint already,

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1 it would be efficient for all involved for the amendment to
2 take place with consent of the parties before the defendants
3 need to spend a lot of time briefing this motion.

4 It's in part to facilitate such conversations that I'm
5 setting this briefing schedule as well. My hope is that the
6 parties will talk about whether there is a proposed amended
7 complaint to which they can agree, subject to any reservation
8 of rights to move to dismiss the amended complaint. So I
9 encourage the parties to talk seriously about that prospect.
10 If there's no agreement, the motions to dismiss will be due on
11 the 1st and any response, whether that be an opposition or an
12 amendment permitted by Rule 15(a)(1), would be filed within 21
13 days.

14 So I think that's it. Anything else that we need to
15 talk about here?

16 Oh, I should say, my view is that my prior order to
17 stay these proceedings pending briefing and resolution of the
18 motion to dismiss by QIPCO applies with equal force here.
19 There is good cause to stay discovery in this action pending
20 briefing and resolution of these motions, as well as the QIPCO
21 motion for substantially the same reasons that I articulated
22 earlier. I described the relevant factors with respect to
23 burden of discovery and the prejudice to the nonmoving party in
24 our prior conversation, and my view of each of those factors
25 remains much the same.

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1 With respect to the first aspect of the test that the
2 Court should apply in evaluating whether good cause exists,
3 namely, the strength of the proposed motion, as before, I don't
4 take a position regarding the ultimate merits of the arguments.
5 I will reserve any judgment on that until I've seen the
6 briefing. But, again, I note that these motions, if
7 successful, will be fully dispositive of all of the issues in
8 this case, which weighs in favor of granting — of staying the
9 matter pending briefing and resolution of the motions.

10 I also note the defendants' argument regarding the
11 validity of the fraud arguments here. I look forward to seeing
12 the briefing on the issues given that, as I understand it, the
13 basis for the fraud claim is an omission, but plaintiff asserts
14 that the omission in the voices of Superfreight and DTD are
15 omissions from an agent to QIPCO, not an agent to it. So I
16 look forward to seeing the briefing on the nature of the duty
17 that gives rise to an obligation to speak such that the
18 omission here is fraudulent, and that's an issue that I'm
19 looking forward to seeing the parties' briefing on.

20 So I'll enter an order with that briefing schedule and
21 staying the action pending briefing and resolution of those
22 motions.

23 Is there anything else that we need to talk about here
24 before we adjourn? I'll start with counsel for plaintiff.

25 MR. McCULLOUGH: Yes, Michael McCullough for the

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1 plaintiff, your Honor.

2 We did make a request for a single document. Is it
3 possible we could address that?

4 THE COURT: Please go ahead.

5 MR. McCULLOUGH: So as we mentioned in our letter,
6 there is a single document that's been produced in the London
7 litigation that bears on our fraud claim, and we don't know how
8 quickly we could get a release of that document from the London
9 judges. They're working on other issues right now.

10 I'm wondering if it's possible that in this action we
11 could just get limited discovery on the single document, which
12 would facilitate our amendment and might make it easier on all
13 of us in — as both counsel for Superfreight and Door To Door
14 mentioned, make it easier for us to get through this motion to
15 dismiss.

16 THE COURT: Thank you.

17 I will hear from each of the defendants on this, and I
18 appreciate that there may be limitations on your ability to
19 talk about these issues. I frankly don't know what they are,
20 but one challenge here is that I have very limited information
21 about the nature of the discovery that's sought or its effect
22 on the potential pleadings. I will be fully respectful of any
23 limitations on you and your assessment of what those
24 limitations are, so I'm not pushing you or ordering you to tell
25 me anything that you think would be out of bounds based on the

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1 constraints in the UK litigation. You should feel no
2 hesitation in telling me that you do not believe that,
3 consistent with those limitations, you can tell me something.
4 So you're fully authorized to tell me no or to tell me that
5 you're limited in your ability to discuss issues.

6 That said, without more information about what this
7 is, why it's needed, and the nature and scope of the discovery
8 that would be needed, it's hard for me to rule on the request.
9 So any information that you feel that you can properly share
10 with me would be welcome.

11 Counsel for plaintiff.

12 MR. McCULLOUGH: Michael McCullough.

13 Unfortunately, as we mentioned in the letter, there's
14 not more information that we can give you other than the
15 document would enable us to produce a second amended
16 complaint with greater detail on the fraud claim. There's not
17 much more I can say without disclosing the nature of the
18 document, which I'm not allowed to do.

19 THE COURT: Thank you.

20 Let me hear from each of the defendants. First,
21 defendant QIPCO.

22 MR. SMITH: Thank you, your Honor. Dustin Smith from
23 Hughes Hubbard & Reed on behalf of QIPCO.

24 I think we're a little bit at sixes and sevens as
25 well, your Honor. Being that we don't know what this document

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1 is, we don't know, as a result, what the restrictions may be on
2 it from the UK proceedings or interplay with the anti-suit
3 injunction. So it's hard to respond to the request in that
4 regard without having any information, as this is the first
5 we've heard of it is this briefing. We haven't had any contact
6 from plaintiffs' counsel regarding this or requesting it
7 outside this letter.

8 Then just additionally, it seems to be at
9 cross-purposes with the purpose of the stay that the Court
10 previously entered, which is the gravamen of our argument is
11 that this suit was improperly brought in this court because of
12 the jurisdictional provisions, the choice of jurisdiction
13 provisions. So it would seem inconsistent with prior rulings
14 to grant any discovery pending the outcome of the anti-suit
15 injunction.

16 So it's kind of where we're at right now in regards to
17 this request.

18 THE COURT: Thank you.

19 Counsel for Superfreight.

20 MR. MERRICK: Chris Merrick.

21 MR. WHITTICAR: I'm sorry.

22 MR. MERRICK: Chris Merrick on behalf of defendants
23 Simon Jones Superfreight.

24 We would echo all of those comments by QIPCO. We
25 don't have any idea what this document is or what it would

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1 purport to show, so it's difficult to comment.

2 And it does seem like your Honor's already made up
3 your mind about amendment. Just for the purposes of making a
4 record at least, we just wanted to cite *Moore's Federal*
5 *Practice: Civil* Section 15.10 and the rule of 15(a)(1), which
6 is that a party may amend its pleading as a matter of right
7 only once, and that includes any prior amendments the plaintiff
8 may have already made. Here, there is already an amended
9 complaint, so we don't believe that the plaintiff would have
10 the ability to amend as of right as of this time.

11 So to the extent that there is a desire on the behalf
12 of the plaintiff to amend, we would urge the Court to perhaps
13 set a briefing schedule on the motion for leave to amend or a
14 deadline to amend so that the parties don't spend the time,
15 money, and energy on duplicative briefing to brief and then
16 wait for a motion to be filed and then have additional briefing
17 on the motion and potentially another round of briefing on a
18 motion to dismiss. My client is a small company. That's a
19 significant hardship, and we'd be very appreciative if the
20 Court would entertain the possibility of making a determination
21 about whether amendment will be allowed before the motions to
22 dismiss are filed.

23 THE COURT: Thank you.

24 Good. So, first, thank you very much for flagging
25 that part of the procedural history here. To paraphrase

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1 Lin-Manuel Miranda, I did not realize that plaintiff may have
2 thrown away its shot with its one free amendment as of right.
3 I was operating under the assumption that they had not yet done
4 so, and that's an important factor. I appreciate you bringing
5 it to my attention. So I will come back to that topic.

6 But let me hear, first, from counsel for DTD.
7 Anything on the additional discovery request?

8 MR. WHITTICAR: This is Mr. Whitticar, your Honor, for
9 DTD.

10 I don't know — I don't have enough information to
11 agree to it. I mean, there is a venue challenge here. But I
12 don't know that I can ascertain who supposedly has it, what it
13 supposedly says, or whether it even involves my client. So
14 given the lack of information available, I respectfully
15 withhold my consent to the request.

16 THE COURT: Thank you.

17 I'm going to deny the request. I stayed discovery
18 here for the reasons that I've already articulated. Counsel's
19 already raised the pending venue challenge here, so there's a
20 question as to whether or not this case should be here at all
21 and, as a result, whether it should be used as a vehicle to
22 obtain discovery that is restricted in a foreign proceeding. I
23 understand that there may be an alternative vehicle in the
24 proceedings in the UK court to permit the use of that
25 information, but I stand by my decision that the stay, plenary

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1 stay, of discovery is warranted in this case.

2 Counsel for plaintiffs, I appreciate again
3 Superfreight's counsel's reminder that you apparently already
4 have amended your complaint once as of right. I will just
5 encourage you to talk with the parties here.

6 How does this impact your process? If I grant the
7 motion to dismiss and you have not filed a proposed request to
8 amend the complaint now knowing all of these proposed grounds
9 for amending the complaint, knowing what you know now about the
10 nature of the arguments, I may take the position that, given
11 the fact that you were informed of the nature of the
12 allegations in the letters and you had information and, indeed,
13 have informed the Court that you have information that would
14 enhance your complaint, that you should not be granted leave to
15 amend again.

16 So I strongly encourage you to talk. I'm not saying
17 that I would do that, but I may do that. As a result, it makes
18 a lot of sense for the parties to talk about setting a schedule
19 for an amendment under 15(a)(2) with the consent of the parties
20 or for the filing of a motion to amend the complaint, assuming
21 that the parties cannot agree upon a proposed amended complaint
22 here. So I strongly again encourage the parties to do so, but
23 now I do so without thinking that you have an escape hatch,
24 counsel for plaintiff, and the opportunity to amend the
25 complaint following the filing of the motions to dismiss.

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1 So I strongly encourage the parties to talk about
2 that, and I'm going to ask that any letter regarding the
3 parties' discussions with respect to a potential amendment be
4 filed with the Court no later than a week from today. In that
5 letter, I'm going to direct plaintiffs' counsel to advise the
6 Court if plaintiff wishes to amend the complaint. If it does
7 wish to amend the complaint, you should let me know what the
8 positions of the parties are regarding that proposed amended
9 complaint. And if there is no agreement amongst the parties,
10 then I will ask that the parties propose a briefing schedule in
11 that letter regarding a timeline for potentially moving to
12 amend the complaint. All of this will inform the schedule for
13 the motions to dismiss, and it's in part because of that that
14 I'm asking for the letter to be submitted to me relatively
15 promptly so that the defendants can potentially push back the
16 time at which they begin their work on briefing the motion.
17 I'll include that in my order after today's proceeding as well.

18 Very good. So thank you all very much for your time.

19 Thank you again, counsel for Superfreight, for
20 flagging that detail for the Court.

21 This proceeding is adjourned.

22 (Adjourned)